# REPLY BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

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15-3014

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GARY L. SHORT,

Appellant,

v.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS,

Appellee.

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## APPELLANT'S REPLY ARGUMENT

**The Board committed prejudicial legal error when it failed to consider whether the Veteran was eligible for a higher rate of SMC based on his need for regular aid and attendance.**

The Secretary argues that the Board's award of Special Monthly Compensation ("SMC") is a full grant of requested benefits because the Board determined that the Veteran was entitled to aid and attendance due to his service-connected cardiac and psychiatric disability, and suggests that there is no case or controversy. Sec. Brief at 4. This argument represents a misinterpretation of the law and the Veteran's argument as set forth in his opening brief. *See* Apa. Open Brief at 7-13. The Secretary's argument should therefore be soundly rejected and the case should be remanded for the Board to ensure that the Veteran receives the maximum amount of compensation that he may be entitled to.

"SMC is available when, 'as the result of service-connected disability,' a veteran suffers additional hardships above and beyond those contemplated by VA's schedule for rating disabilities." *Breniser v. Shinseki,* 25 Vet.App. 64, 68 (2011) (citing 38 U.S.C. § 1114(k)-(s)). The rate of SMC "varies according to the nature of the veteran's service-connected disabilities." *Moreira v. Principi,* 3 Vet.App. 522, 524 (1992). Subsection (p) provides for half or full-step increases to the next higher rate in subsections (1) through (n) for a veteran whose condition exceeds the requirements of his current rate, but does not qualify for the next higher rate. *Breniser,* 25 Vet.App. at 79.

In the present case, the Board found that the Veteran is incapable of performing activities of daily living without the assistance of another person due to his service-connected cardiac and psychiatric disabilities. R-5. It further noted that the Veteran's activities were restricted by his cardiac condition, PTSD, and neuropathy. *Id.* Along with his cardiac condition, rated 100 percent disabling, the Veteran is also service-connected for PTSD with major depressive order rated as 100 percent disabling, bilateral hearing loss with a 20 percent rating, tinnitus with a 10 percent rating, hypertension with a 10 percent rating, and erectile dysfunction noncompensably rated. *Id.* Apa. Open Brief at 12. In determining that SMC for aid and attendance was warranted, the Board specifically cited to an October 2012 examination which indicated that the Veteran could only stand for two to three minutes due largely to his service-connected cardiac condition. R-6; R-629. As Mr. Short argued in his opening brief, while the Board appeared to focus on his symptoms of CAD, it failed to analyze whether any of his other symptoms, *when viewed separately*, may have also warranted entitlement to SMC. Apa. Open Brief at 7.

The Secretary confirms the basis for the Veteran's argument when noting that the Board determined "the Veteran is unable to perform his activities of daily living and protect himself from his environment without regular assistance from another person due to his service-connected cardiac ***and*** psychiatric disabilities." R-3; Sec. Brief at 6 (emphasis in Secretary's brief). The Secretary also notes that the Veteran is already receiving SMC at the housebound rate, and was only seeking SMC based for

the need for aid and attendance in the present appeal. *Id.* The Secretary then asserts that in the Veteran's notice of disagreement with a July 2013 rating decision, he checked only "service connection" and not "evaluation of disability" to suggest that aid and attendance was the only issue on appeal. R-798; Sec. Brief at 7. Apparently then, so goes the Secretary's argument, because aid and attendance was the only issue on appeal and was granted by the Board, there is no case or controversy to be decided by the Court. *Id.*

However, the Secretary's focus on semantics does nothing to address the argument put forth by the Veteran. As noted in the opening brief, the Board is required "to maximize benefits," which includes a requirement to consider whether a claimant is entitled to SMC including an even higher level of SMC than that awarded by the Board. *Buie v. Shinseki*, 24 Vet.App. 242, 250-51 (2011) ("VA's duty to maximize benefits requires VA to assess all of the claimant's disabilities without regard to the order in which they were service connected to determine whether any combination of the disabilities establishes entitlement to special monthly compensation under section 1114(s).") Apa. Open Brief at 8.

The Secretary suggests that the issue of the proper compensation level in the present case is a "downstream" issue which can only be appealed by filing a new NOD after the underlying benefit has been granted and an effective date assigned. Sec. Brief at 6. However, this interpretation of the downstream element rule is at odds with VA's duty to maximize the benefit the Veteran is entitled to pursuant to 38

C.F.R. § 3.103(a) (2015), which states that VA has an obligation "to render a decision which grants every benefit that can be supported in law." Indeed, taking the Secretary's position to the extreme, every time a veteran is awarded an increased rating the case must be returned to the RO for implementation and for the Veteran to file a new NOD in order for the Veteran to challenge the rating. This is not the intent of the law.

In addition to being inconsistent with the requirement that VA maximize the benefits to which the Veteran may be entitled on each individual claim, the Secretary's position is also not consistent with the pro-claimant nature of the veteran benefits system. *See Barrett v. Nicholson,* 466 F.3d 1038, 1044 (Fed.Cir.2006) ("[t]he government's interest in veterans cases is not that it shall win, but rather that justice shall be done, that all veterans so entitled receive the benefits due to them.") Requiring a veteran to disagree with every rating decision he or she receives in order to obtain the rating he or she deserves is at odds with the principle that in proceedings before the Board, "the relationship between the veteran and the government is non-adversarial and pro-claimant." *Comer v. Peake*, 552 F.3d 1362, 1368 (Fed. Cir. 2009). Indeed, "[t]he VA disability compensation system is not meant to be a trap for the unwary, or a stratagem to deny compensation to a veteran who has a valid claim[.]" *Id.* As such, the Secretary's argument that Mr. Short's entitlement to an additional amount of SMC is a downstream issue should be soundly rejected.

As VA was required to address Mr. Short's claim for Aid and Attendance with the presumption that he was seeking the maximum benefit to which he may be entitled, requiring him to await an RO rating decision and file an NOD simply because the Board decision granted him a benefit to which he is entitled would represent a misinterpretation of the relevant law. *See AB v. Brown*, 6 Vet.App. 35, 38 (1993) ("the claimant will generally be presumed to be seeking the maximum benefit allowed by law and regulation, and . . . such a claim *remains in controversy* where less than the maximum available benefit is awarded.") (emphasis added). As such, this position taken by the Secretary is not supported by the relevant law and must be rejected.

This is particularly critical in the present case, as VA regulations provide that intermediate special monthly compensation ratings may be applicable in certain situations, to be established "at the arithmetic mean, rounded to the nearest dollar, between the two rates concerned." 38 C.F.R. § 3.350(f) (2015). To that end:

> Additional single permanent disability or combinations of permanent disabilities independently ratable at 50 percent or more will afford entitlement to the next higher intermediate rate.

38 C.F.R. § 3.350(f)(3). Therefore, if a veteran is entitled to aid and attendance under 38 U.S.C. § 1114(l) based on one or more disabilities, and has additional disabilities independently ratable at 50 percent or more, he or she is entitled to a higher rate of compensation "at the arithmetic mean, rounded to the nearest dollar, between" the rates prescribed in 38 U.S.C. §§ 1114(l) and 1114(m). *See* 38 C.F.R. § 3.350(f).

Additionally, SMC under 38 U.S.C. § 1114(o) could be established if a veteran, as the result of service-connected disability, has suffered disability under conditions that would entitle him to two or more of the rates provided in one or more of § 1114(l) through § 1114(n), no condition being considered twice in the determination. Finally, VA regulations provide a higher rate of SMC at the 38 U.S.C. § 1114(r)(1) level based on the need for special aid and attendance. 38 C.F.R. § 3.350(e)(1)(ii), (h); 38 U.S.C. § 1114(o), (r). *See* Apa. Open Brief at 9-10.

Put simply, based on the Board's findings, the evidence of record establishes that the Veteran is entitled to *at least one* rate provided in 38 U.S.C. § 1114(l)–for his CAD. However, the Board did not discuss whether Mr. Short could receive aid and attendance based on *each* of his service-connected disabilities considered individually. R-4-7. In other words, the Board failed to analyze his service-connected disabilities *separately*, rather than together or rather than just his CAD, for purposes of establishing the need for aid and attendance. *See id.*; Apa. Open Brief at 10-11.

The Secretary suggests that the Board's analysis was proper because the Veteran "has not presented any evidence to demonstrate that the Board's decision was clearly erroneous as to finding that his need for regular aid and attendance was based on Appellant's service-connected CAD as well as his service-connected PTSD." Sec. Brief at 7-8. This is a misinterpretation of the law. The Court reviews claimed legal errors by the Board under the *de novo* standard, by which the Board's decision is not entitled to any deference. 38 U.S.C. § 7261(a); *see Martin v. Brown*, 6 Vet.App. 272,

274 (1994). The Veteran is claiming that the Board committed a legal error by failing to consider whether his service-connected conditions considered separately, as opposed to in combination, may entitle him to SMC, which would result in an increased benefit pursuant to the statute and regulations discussed *supra*. When the Veteran is asserting that the Board made an error of law, the Court reviews the issue *de novo* and he is therefore not required to demonstrate that the Board's findings were clearly erroneous.

For the same reasons, the Secretary's argument that the Veteran's claim for SMC was direct and not implied and therefore outside the province of VA's adjudication manual must also be rejected. Sec. Brief at 9. Regardless of how the issue wound up before the Board, the Board must presume that the Veteran is seeking the maximum benefit available and review all potentially applicable provisions of law and regulation to that end. *See Schafrath v. Derwinski,* 1 Vet.App. 589, 592–93 (1991) (stating that the Board is required to discuss in its decision all "potentially applicable" provisions of law and regulation (citing 38 U.S.C. § 7104(a))). Its oversight in this regard was prejudicial because it precluded consideration of the maximum amount of compensation allowable under the law. *See also AB*, 6 Vet.App. at 38.

To be clear, the Veteran's citation to VA's adjudication manual was for the principle that entitlement to Aid and Attendance must be considered for all single disabilities rated at 100 percent. Apa. Open Brief at 11-12. Simply because the manual instructs adjudicators to consider it as an inferred issue, and the Veteran

claimed it directly, does not change the fact that it must be considered by the Board. Importantly, Mr. Short is service-connected for two separate disabilities rated at 100 percent disabling, his CAD and his PTSD. There is evidence to suggest that each condition *alone* may render him totally disabled and in need of aid and attendance. *See* R-537-539 (Veteran's wife's testimony that Veteran does not get out of bed and requires assistance with eating and medication due to PTSD symptoms); R-629 (A&A exam indicating Veteran can only stand for minutes at a time due to CAD).

Accordingly, the Board should have considered whether each condition *alone*, without consideration of the other, would require aid and attendance. In accordance with the provisions of 38 U.S.C. § 1114, had it done so it may have found that the Veteran would then be entitled to an "L" for CAD and an "L" for PTSD and/or his other disabilities, which should entitle him to the SMC level of "O" and then at least "r-1" since the Board has already determined that the veteran is entitled to SMC based on Aid and Attendance. *See* 38 C.F.R. § 3.350(e)(1)(ii) (2015). As the Board failed to do so, its decision must be vacated to the extent that it failed to consider an even higher level of SMC and the appeal remanded with instructions for it to consider rating the Veteran's disability at the "r-1" level in order to ensure that he receives the maximum potential benefit that he is entitled to. Apa. Open Brief at 13.

The Secretary, in arguing that the issue of entitlement to a higher level of special monthly compensation was not before the Board misinterprets both the Veteran's argument and the applicable law, as described more fully in the Veteran's

opening brief. Sec. Brief at 9. As such, his arguments must be rejected and this case must be remanded for the Board to properly apply the law and ensure that the Veteran receives the maximum benefit to which he may be entitled.

## CONCLUSION

The laws and regulations governing special monthly compensation require that multiple service-connected disabilities which may each be capable of causing the need for aid and attendance be considered separately in determining the proper amount of SMC to which a Veteran is entitled. By only considering one of the Veteran's service-connected disabilities, or alternatively considering multiple service-connected disabilities in combination, the Board committed prejudicial legal error. For the foregoing reasons, along with those presented in his opening brief, Mr. Short respectfully requests that the Board's decision be vacated and his appeal remanded so that the Board may properly apply the law and ensure that he receives the maximum benefit to which he is entitled.

Respectfully submitted,

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